

JUN 10 1997

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF NORTH CAROLINA

Western District of NC  
J. Baron Groshon, Clerk  
By: RSS, Deputy Clerk

In Re: )  
 )  
HUMBOLDT EXPRESS, INC., )  
 )  
Debtor(s). )

Case Nos. 96-30112  
and 96-30222  
Chapter 11

\_\_\_\_\_  
APEX EXPRESS CORPORATION and  
HUMBOLDT EXPRESS, INC.,

Adversary Proceeding  
No. 96-3548

Plaintiff(s),

v.

THE WISE CO., INC.,

Defendant(s).  
\_\_\_\_\_

JUDGEMENT ENTERED ON JUN 10 1997

**ORDER**

**GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT  
AND DENYING DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT  
ON INTRASTATE CLAIMS, STAY OF PROCEEDINGS AND REFERRAL  
TO THE SURFACE TRANSPORTATION BOARD ON INTERSTATE CLAIMS,  
AND FOR PROTECTIVE ORDER STAYING DISCOVERY**

This matter is before the court on plaintiff Humboldt Express, Inc.'s Motion for Summary Judgment. The court also considered defendant The Wise Company, Inc.'s Cross-Motion for Stay of Proceedings and Referral to the Surface Transportation Board on Interstate Claims, Summary Judgment on Intrastate Claims, and Protective Order Staying Discovery. After consideration of the parties' motions and supporting documentation, the record in this adversary proceeding, and the arguments of counsel, the court has

concluded that Humboldt's Motion should be granted and that Wise's Motion should be denied in all respects.

#### STATEMENT OF THE CASE

This is an action by a trucking company to collect for billed but unpaid freight charges against one of its customers. The carrier Humboldt has ceased operations and is the debtor in a Chapter 11 bankruptcy liquidation proceeding. This adversary proceeding is one of hundreds that Humboldt has filed to collect freight charges from former customers. The defendant here (and those in the other cases) has raised a variety of legal defenses to Humboldt's action. The court has singled out this case for summary judgment because there are no genuine factual issues present and it therefore may serve as a vehicle for resolution of the numerous legal issues raised by Wise.

On March 29, 1997, Humboldt filed its Motion for Summary Judgment, Memorandum in Support of its Motion and supporting documentation, including affidavits from three witnesses attesting to the facts supporting Humboldt's Motion. Humboldt's Motion seeks judgment against Wise in the sum of \$6,544.52. Humboldt noticed its Motion for hearing April 10, 1997.

On or about April 7, 1997, Wise filed its Memorandum of Law in Opposition to Humboldt's Motion with supporting documentation, including affidavits from three witnesses. Wise's Memorandum disputes the facts set forth in Humboldt's Motion, asserts Humboldt

failed to present a *prima facie* case, requests "referral"<sup>1</sup> of myriad issues to the Department of Transportation's Surface Transportation Board ("STB"), requests dismissal of Humboldt's claims based upon intrastate shipments, and raises numerous legal defenses to Humboldt's claims. On April 8, 1997, Wise filed its Motion seeking affirmatively the same relief outlined in Wise's Memorandum. In fact, Wise's Motion was virtually identical to its Memorandum, containing the same legal argument on the same factual and legal issues, and containing as exhibits the same affidavits and supporting documentation annexed to Wise's Memorandum.

On April 9, 1997, Humboldt submitted its Reply to Wise's Memorandum challenging, *inter alia*, the sufficiency of the evidence submitted by Wise. Humboldt's Reply contends Wise failed to raise an issue as to any material fact because no competent and probative evidence disputing Humboldt's probative evidence was introduced by Wise. Humboldt also denied the legal sufficiency of the many defenses raised by Wise in its Memorandum and subsequent Motion.

On April 10, 1997, the court heard oral argument on Humboldt's Motion. Both parties were represented by counsel, and argument was heard on each point raised by the parties' pleadings. Since

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<sup>1</sup> Technically, "referral" is a misnomer. The proper procedure for obtaining agency determination of issues within its expertise is for the court to modify the automatic stay of 11 U.S.C. § 362 and stay the adversary proceeding to allow reasonable time for a party to file a petition before the agency and obtain the required determination. Reiter v. Cooper, 507 U.S. 258, 269, n. 3.

Wise's Motion, noticed by Wise for hearing May 28, 1997, addressed the identical arguments and issues raised in Wise's Memorandum, the court simultaneously considered Wise's Motion during argument on Humboldt's Motion. The court took Humboldt's Motion and Wise's Motion under advisement after the April 10 hearing. (The court intends to decide only the present case by this Order. But, the resolution of legal issues common to other cases will certainly impact them. Consequently, the court delayed final decision and entry of this Order until after hearing argument on similar issues in nineteen other cases [Hearings of May 28, 1997]).

After due consideration of the parties' pleadings and arguments, and after reviewing the record in this adversary proceeding, the court concludes Humboldt has met its burden of proof and has established its *prima facie* case by a preponderance of the evidence. However, Wise has failed to submit competent and probative evidence sufficient to rebut Humboldt's proof, thus, entitling Humboldt to judgment as a matter of law. Further, the court finds Humboldt's argument and authority opposing each defense raised by Wise to be persuasive. The court, therefore, orders judgment in favor of Humboldt on its claims and denies the relief requested in Wise's Memorandum and Motion.

Wise's request for "referral" of specific issues to the STB must also be denied. Wise has failed to raise a single issue implicated by the evidence in this case that is beyond the

jurisdiction or the competence of this court to decide. To the extent this court has concurrent jurisdiction with the STB of specific issues, the court finds no agency expertise is necessary to decide those issues. To the extent Wise has raised specific issues within the exclusive jurisdiction of the STB, the court finds, as a matter of law, that such issues are not implicated in this case. Thus, Wise's request for referral of issues to the STB is hereby denied.

#### JURISDICTION

Wise has asserted that this is a "related to" proceeding in which the bankruptcy court has jurisdiction only to enter a recommended order for the District Court's consideration. The court has concluded instead that this is a "core" proceeding, pursuant to 28 U.S.C. § 157(b)(2)(A), (E), and (O). Consequently, the bankruptcy court has jurisdiction to enter this dispositive order.

Pursuant to 28 U.S.C. § 157(b)(3), the bankruptcy court must determine whether a proceeding is a core proceeding under 28 U.S.C. § 157(b)(1) or a non-core related proceeding under 28 U.S.C. § 157(c)(1). The practical consequence of the distinction between a core proceeding and a non-core related proceeding is that a bankruptcy judge may hear and determine core proceedings and enter appropriate orders and judgments, while in a non-core related proceeding, the judge must submit proposed findings of

fact and conclusions of law to the district court for review on a de novo basis. Section 157(b)(2) sets out a non-exhaustive list of proceedings which are core proceedings. The portions which are deemed relevant to these proceedings are as follows:

Core proceedings include, but are not limited to --

(A) matters concerning the administration of the estate; . . .

(E) orders to turn over the property of the estate; . . .

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

28 U.S.C. § 157(b)(2).

This proceeding is an action to collect the late payment charges for transportation services owed to the debtor Humbolt by the defendant Wise. As such, it is in the nature of an action to collect an accounts receivable, and is not a claim for liquidated damages as is suggested by Wise. An analysis of the case law demonstrates that there is no consensus or controlling authority on the issue of whether an action to collect an accounts receivable is a core or non-core related proceeding. Compare In re Allegheny, Inc. 68 B.R. 183 (Bankr. W.D. Pa. 1986) (core); In re National Equipment and Mold Corporation 60 B.R. 133 (Bankr. N.D. Ohio 1986) (core); In re Leco Enterprises, Inc. 125 B.R. 385 (S.D.N.Y. 1991) (core); In re Wilson Feed Company, Inc. 142 B.R. 123 (Bankr. E.D. Va. 1992) (core); with In re Aristera Co., 65 B.R. 928 (Bankr. N.D. Tex. 1986) (non-core);

In re Lyons Transp. Lines, Inc., 150 B.R. 15 (Bankr. W.D. Pa. 1993) (non-core); In re Tobler Transfer, Inc., 74 B.R. 373 (Bankr. C.D. Ill. 1987) (non-core); In re Smith Douglass, Inc., 43 B.R. 616 (Bankr. E.D.N.C. 1984) (non-core).

The court has concluded that the instant case is a core proceeding, under subsections (A), (E), and (O) of 28 U.S.C. § 157(b)(2). Subsection (A) of § 157(b)(2) expressly specifies as core proceedings "matters concerning the administration of the estate." The court believes that this action to collect on accounts receivable is one which does concern the administration of the estate. The present bankruptcy case is a Chapter 11 liquidation case. The only remaining assets of the estate are the accounts receivable Humboldt is seeking to recover through actions such as this one. Therefore, the recovery of these accounts receivable not only concerns the administration of the bankruptcy estate but these accounts receivable **are** this bankruptcy estate. Other courts support this proposition that proceedings to collect accounts receivable are "matters concerning the administration of the estate" and are therefore core proceedings under 28 U.S.C. § 157(b)(3)(A). See In re Wilson Feed Company, Inc., 142 B.R. 123 (Bankr. E.D. Va. 1992); In re Allegheny, Inc., 68 B.R. 183 (Bankr. W.D. Pa. 1986); In re Leco Enterprises, Inc., 125 B.R. 385 (S.D.N.Y. 1991).

Subsection (E) of § 157(b)(2) also designates "orders to turn over property of the estate" as core proceedings. Other courts have ruled that an accounts receivable action by the debtor is in fact a turnover action. In re Allegheny, Inc. 68 B.R. 183 (Bankr. W.D. Pa. 1986); In re National Equipment and Mold Corporation 60 B.R. 133 (Bankr. N.D. Ohio 1986); In re Leco Enterprises, Inc. 125 B.R. 385 (S.D.N.Y. 1991); In re Wilson Feed Company, Inc. 142 B.R. 123 (Bankr. E.D. Va. 1992). Under 11 U.S.C. § 542(b) which is entitled "Turnover of property to the estate," "an entity that owes a debt that is property of the estate and that is matured, payable on demand, or payable on order" must pay that debt to the trustee. Other courts have found that an accounts receivable action is a "matured" debt which is property of the estate, subject to a turnover action. In re Allegheny, Inc. 68 B.R. 183 (Bankr. W.D. Pa. 1986); In re Wilson Feed Company, Inc. 142 B.R. 123 (Bankr. E.D. Va. 1992). This court therefore believes that the present action to collect an accounts receivable is an action for a turnover of property of the estate and is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(E).

The court also concludes that the present action is a core proceeding under subsection (O) of 28 U.S.C. § 157(b)(2). This subsection includes as core proceedings "other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder

relationship, except personal injury tort or wrongful death claims." 28 U.S.C. § 157(b)(2)(O). This language serves as the catch-all section of what are to be included as core proceedings. Other courts have found that an accounts receivable action is a core proceeding pursuant to this section. See In Re Allegheny, Inc. 68 B.R. 183 (Bankr. W.D. Pa. 1986); In Re Leco Enterprises, Inc. 125 B.R. 385 (S.D.N.Y. 1991).

The present action to collect the accounts receivable from Wise is a proceeding which will have a direct affect on the liquidation of the estate. As stated previously, the money collected through actions such as this one by Humboldt will constitute the bankruptcy estate. Whatever money that is collected through these actions will go to creditors upon liquidation of the debtor. This action to collect on the accounts receivable is therefore a core proceeding under 28 U.S.C. § 157(b)(2)(O).

Accordingly, the court holds that this action is essentially a collection of an accounts receivable and that it is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (E), and (O). The court therefore has jurisdiction to enter appropriate orders and judgments pursuant to 28 U.S.C. § 157(b)(1), and will proceed to do so below.

#### SUMMARY JUDGMENT STANDARD AND BACKGROUND FACTS

Bankruptcy Rule 7056 applies Rule 56 Fed. R. Civ. P. as the standard for summary judgment in adversary proceedings. It requires the granting of summary judgment to a claimant when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c). Fed. R. Civ. P. The moving party has the initial burden of demonstrating that there is no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). Once the moving party has made such a showing, the "adverse party may not rest upon the mere allegations or denials in the adverse party's pleadings, but the adverse party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial." Rule 56(e), Fed. R. Civ. P. (emphasis added); see also, Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1987). If the adverse party fails to make such an affirmative showing, then entry of summary judgment for the movant is appropriate. Rule 56(e), Fed. R. Civ. P.

In this proceeding, Humboldt (movant) has made the showing required of it by Rule 56. Wise has submitted opposing

affidavits, but these fail to demonstrate any actual genuine issue of material fact.

Humboldt's evidence consists essentially of its business records and certain of Wise's responses to discovery. Humboldt has submitted affidavits which describe its billing practices, computer billing system and procedures, and the itemization of the bills involved in Wise's account. Wise's discovery responses admitted: receipt of the freight bills; notice of the credit terms for entitlement to discount and the penalty for late payment; receipt of past due bills; and failure to pay the late payment charges.

Wise attempted to create a factual dispute by offering the affidavits of its president, Freudenberg, and a freight bill auditor, Allen. Neither of these affidavits contributes probative evidence, so they fail to create any genuine issue of material fact. Freudenberg's affidavit contains a number of conclusory statements, but does not demonstrate his competence in any way. There is nothing to show that he had any personal knowledge of the matters he states or that he is otherwise qualified to testify. In fact, defendant's discovery identifies someone else as the person who has knowledge about these matters (and does not list Freudenberg). So, Freudenberg's Affidavit contains either incompetent conjecture or inadmissible hearsay. It fails to meet the requirements of Rule 56(e) because it fails to show personal knowledge, competence or specific facts.

Allen's affidavit simply misses the point. He testified that Humboldt did not send him the original invoices - but that does not dispute whether they were sent to Wise. Thus, his evidence is simply irrelevant.

Further, conspicuously absent from Wise's submission is any offer of contemporaneous business records or other evidence to support its assertions. Consequently, the court finds and concludes that Wise has failed to offer probative evidence which creates a genuine issue of material fact in this case.

In light of the foregoing, the court makes the following findings of fact in support of its decision in this adversary proceeding:

1. At all times relevant to this case, Humboldt was a motor common carrier operating in interstate and/or intrastate commerce pursuant to authority issued by the ICC and/or various state agencies.

2. At various times between March 25, 1994 and September 22, 1995, Wise tendered freight to Humboldt for transportation in interstate and/or intrastate commerce. Humboldt accepted said freight and performed the transportation services subject to the common carrier tariff rates and rules provisions Humboldt had on file with the ICC until August 24, 1994, with various state utility commissions until January 1, 1995, and at its Nashville, Tennessee headquarters thereafter.

3. Throughout this period, Humboldt had a tariff provision that provided a penalty for nonpayment or late payment of freight charges. Humboldt filed this late payment penalty with the ICC in Item 435-80 of ICC SMC 190-R, 190-S, and 190-T. Thereafter, Humboldt incorporated the same penalty provisions in its private tariff HUMB 190. Humboldt had similar tariff provisions in its intrastate tariffs. Humboldt's rate tariff, ICC SMC 500, references the late payment rules as "governing publications." On October 15, 1994, Humboldt published new Item 100-B in its tariff ICC HUMB 232, which specifically referenced SMC 190, HUMB 190 and SMC 500 as "Rules and Governing Publications."

4. In all cases, Humboldt's tariff provisions required Wise to make payment of freight charges within thirty (30) calendar days of presentation of each freight bill. Failure to make payment within the thirty day period resulted in the forfeiture of all discounts, allowances, or any other reduction in rate to which Wise might otherwise be entitled. In the event that Wise was not subject to discounts, allowances, or any other rate reductions and Defendant failed to pay within the 30 day credit period, such shipment was subject to a service charge of the greater of 30% of the initial bill or \$25.00. These terms were also listed on each original freight bill between the parties for each shipment at issue in this action.

5. Humboldt charged Wise a single rate for each shipment - a discounted rate specifically subject to Humboldt's late

payment terms -- each component of which was contained in Humboldt's lawfully filed or in-house tariffs. This action does not involve "Negotiated Rates." Humboldt did not originally charge Wise unfiled, off-tariff rate and then assert a claim for a higher amount in its tariffs.

6. Humboldt advised Wise of its tariff penalty provisions for late payment. Humboldt's late payment tariff provisions and late payment terms were specifically referenced on every original and past due freight bill that was sent to Wise.

7. Humboldt's sales staff was directed to communicate Humboldt's late payment policy to all customers, including Wise, and, with respect to Wise, such communication was made by Humboldt's sales staff.

8. Humboldt sent its original bills and "past due" bills containing late payment charges to Wise on the dates indicated on the statement of account annexed to Humboldt's Complaint as "Exhibit A." In each instance, Humboldt's past due bills were issued after the applicable credit period had expired, but within ninety (90) days of such expiration date. These "past due" invoices contained collection charges that were assessed on an individual basis on the original freight bills and were not applied to "aggregate" balance due billings on past shipments.

9. All of the information in the statement of account came directly from Humboldt's computer records and accurately reflects

the information pertaining to Wise's account as input by Humboldt contemporaneously with each transaction.

10. Humboldt's computerized records, verified as accurate, complete, and created contemporaneously with each shipment, establish that Defendant did not pay invoices totaling \$6,544.52 for late payment penalties and charges due and owing by Wise to Humboldt.

11. Wise did not dispute the charges contained in Humboldt's past due bills within one-hundred and eighty (180) days of receiving those bills.

12. Wise has submitted no competent evidence that Humboldt's charges are unreasonable.

#### **RIGHT TO JUDGMENT AS A MATTER OF LAW**

Humboldt has demonstrated that it is entitled to judgment against Wise as a matter of law. Wise raised a number of issues relating to Humboldt's practices and applicable transportation regulations. Humboldt has established that its late payment provisions apply to the shipments at issue here, that Humboldt complied with applicable credit regulations and that Wise's failure timely to pay entitles Humboldt to the late payment charges.

Humboldt's Late Payment Provisions Apply to the Shipments at Issue

Wise contends that Humboldt's late payment terms, contained in its ICC SMC 190 and ICC HUMB 190 tariffs, are not applicable to Wise's shipments as follows: (1) the discount tariff applicable to the shipments at issue herein, ICC HUMB 232, refers to its Item 100 as containing its governing publications; (2) ICC HUMB 232 contains no Item 100, and, thus, contains no governing publications; and (3) therefore, the 190-series tariffs do not govern the shipments in question. This argument is flawed and untenable because it fails to take into account the applicable rate tariffs governing the shipments:

Defendant cites no authority for its contention that the discount tariff, rather than the rate tariff, applicable to a shipment must reference a governing rule for the rule to apply. ICC HUMB 232 is a discount tariff, not a rate tariff, and thus the court finds no legal requirement that it reference the governing rules for such to be applicable. A tariff user must look to the base rate contained in the rate tariff to calculate the applicable charges for a given shipment. Humboldt's rate tariff, ICC SMC 500, does list the late payment rules as "governing publications." A tariff user, therefore, would certainly be aware of Humboldt's credit rules from Humboldt's rate tariff.

A review of the tariffs at issue conclusively establishes the applicability of Humboldt's late payment provisions to the shipments at issue. There are three distinct time periods covered by the shipments. The first period existed prior to August 26, 1994, the effective date of the Trucking Industry Regulatory Reform Act of 1994 ("TIRRA"), which abrogated the applicability of the filed rate doctrine.<sup>2</sup> During this period, Humboldt properly assessed rates under ICC SMC 500 and discounted them under ICC HUMB 232 pursuant to Item 1000 of the 232 tariff. ICC SMC 500 specifically referenced ICC SMC 190, containing Humboldt's payment terms, as a "governing" tariff. Thus, for this period, Humboldt complied with the requirement that its rate tariff (SMC 500) reference the payment provisions as a governing publication.

The second period began with the passage of TIRRA and the abrogation of the filed rate doctrine on August 26, 1994. Effective that date, Humboldt's ICC HUMB 232 tariff ceased to operate as a filed rate. However, Humboldt maintained the 232 tariff in identical form as an in-house tariff and charged accordingly. The change in law did not affect in any way the applicability and validity of the SMC 500, HUMB 232 and SMC 190 tariffs with respect to Wise's shipments.

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<sup>2</sup> The doctrine required, prior to TIRRA, that carriers collect and shippers pay only those rates contained in the carrier's filed tariffs. 49 U.S.C. § 10762(a).

The third period began October 15, 1994 when Humboldt published HUMB 190, HUMB 503, and new Item 100-B in its tariff ICC HUMB 232, which specifically referenced SMC 190, HUMB 190, HUMB 503 and SMC 500 as "Rules and Governing Publications." This change did not alter the applicability and validity of Humboldt's late payment provisions with respect to Wise's shipments.

The proper application of Humboldt's tariffs, i.e., applying the rate tariffs SMC 500 and HUMB 503 with their referenced late payment terms (in SMC 190 and HUMB 190) to each shipment and then applying the discount provision (HUMB 232), is a simple matter which completely refutes Wise's assertions. Accordingly, Humboldt has established the applicability of its late payment terms to the shipments at issue.

Further, for shipments moving after August 25, 1994, Wise has waived any right to challenge the rates sought by Humboldt under the "180-Day Rule." The 180-Day Rule requires a shipper to dispute a carrier's bill within 180 days of receipt of the bill or lose its right to contest the charges therein. 49 U.S.C. § 13710(a)(3)(B). Wise has provided no evidence establishing that it disputed the original bills issued to it within 180 days of receiving the bills. It is undisputed that 180 days has past since the original bills and subsequent past due bills were received by Wise. Accordingly, Wise has waived the right to

challenge the applicability of the tariffs used to rate the bills on shipments moving after August 25, 1994.

Humboldt Complied With All Applicable Regulations Concerning Assessment And Collection Of Late Payment Accounts Receivable

1. Humboldt Complied With The ICC Credit Regulations.

The Code of Federal Regulations in effect at all times relevant hereto, 49 C.F.R. § 1320 (1990), establishes both a time limit for payment of freight charges by a shipper or consignee and permits a prescribed form of penalty or liquidated damages against the same for nonpayment within an allotted time frame established in the carrier's filed or (after August 25, 1994) private tariffs. Specifically, 49 C.F.R. § 1320.2 establishes:

(1) A maximum standard credit period of fifteen (15) days, unless the carrier extends its credit period by tariff publication for no longer than thirty (30) days. See 49 C.F.R. § 1320.2(d);

(2) That carriers may, by tariff rule, assess reasonable and certain liquidated damages for all costs incurred in the collection of overdue freight charges. See 49 C.F.R. § 1320.2(g)(1);

(3) That carriers may use one of two methods to assess liquidated damages in their tariffs. The first method is to assess a charge that is separate from and additional to the unpaid freight bill. See 49 C.F.R. § 1320.2 (g)(1)(I). The second method is to require the payment of the full, non-

discounted rate instead of the otherwise applicable discounted rate. See 49 C.F.R. § 1320.2 (g) (1) (ii). In both cases, the tariff provision utilized by the carrier must notify the shipper of the time period within which payment must be received for the shipper to avoid late payment liquidated damages; and

(4) That the tariff rule method for collecting late payment charges shall: (a) be clearly described in the tariff rule; (b) be applied without prejudice or discrimination to all similarly situated shippers and/or consignees; (c) be applied only to the nonpayment of original, separate and independent freight bills and not be applied to aggregate "balance-due" claims, such as the undercharge claims normally sought by trustees in bankruptcy for failure of the carrier to appropriately bill its original charges; (d) not be applied to instances of clear clerical or administrative error; (e) not be applied if the carrier's bill of lading provides for an additional charge independent of the tariff provision; and (f) be applied only after the authorized credit period (in this case thirty days) and only where the carrier has issued a revised freight bill or notice of imposition of collection expense charges for late payment within ninety days after expiration of the authorized credit period. See 49 C.F.R. § 1320.2 (g) (2).

In billing Wise's account Humboldt complied with the credit regulations. Humboldt's bills stated that, pursuant to ICC

regulations, payment was due within fifteen days. Humboldt properly established a thirty day credit period, beginning on the day following the date of mailing of the freight bill, during which payment could be made without additional charges being owed. Humboldt thus complied with 49 C.F.R. § 1320.2(d). Humboldt thereafter established a liquidated damage provision in its tariff for late payment, i.e., payment beyond thirty days. Humboldt thus complied with 49 C.F.R. § 1320.2(g)(1). Humboldt applied the provisions for late payment by either specifically adding a separate additional charge to the unpaid freight bill or eliminating a discount. Humboldt thus complied with 49 C.F.R. § 1320.2 (g)(1)(I) and 49 C.F.R. § 1320.2 (g)(1)(ii).

Humboldt referenced its credit terms on every freight bill that was sent to Wise as part of each initial shipment. The credit terms were clearly stated in unambiguous terms on the freight bill and in Humboldt's applicable tariffs. Wise was made aware of Humboldt's tariffs, and the penalties for late payment. Humboldt sent the past due invoices as separate bills and not as part of any aggregated "balance due" claim. Humboldt had no separate bill of lading provision apart from its tariff that would have conflicted with the late payment provision. The original past due invoices specifically repeated the aforementioned penalty provisions and were sent out after the 30 day credit period, but before 90 days from the expiration of the

credit period, according to Humboldt's records. Humboldt thus complied with all of the provisions of 49 C.F.R. § 1320.2 (g)(2).

The Complaint against Wise contains, as Exhibit A, a statement of account listing each invoice for which Humboldt's business records show Wise failed to make full payment. The statement of account indicates the original freight bill date (the pick up date), the date Humboldt's computer records show the invoice was presented (i.e., mailed) to Wise for payment, the date that Humboldt issued its original past due invoice, the date Wise made its partial payment to Humboldt (unless no payment was made), the amount of the partial payment, and the amount that still remains due and owing. Humboldt's affidavit evidence establishes that this statement was produced from original information input into Humboldt's computer system regularly, and that the information contained therein is accurate and complete.

Wise has failed to submit competent evidence to rebut Humboldt's evidence. Therefore, the Court finds Humboldt's records accurately reflect that it properly rebilled Wise on the dates indicated on the statement of account and that this rebilling occurred within ninety days after the expiration of the authorized credit period (i.e., 120 days after presentation of the initial invoice). The court also finds Humboldt is not seeking any late payment charges based upon aggregated "balance due" undercharge claims. In this action, Humboldt is simply

seeking to collect the sum total of the originally-assessed late payment charges. Accordingly, Humboldt's efforts to collect its late payment charges are and have been in total compliance with the ICC's regulations.

**2. Humboldt Is Not Required To Establish The Postmark Date of Mailing Past Due Bills To Prevail On Its Claims.**

Wise, citing 49 C.F.R. § 1320.4(c), contends Humboldt must establish the 'postmark' date on which the original freight bills were mailed to collect its accounts receivable. However, the court is persuaded that this regulation merely requires a carrier to accept the postmark date as the date of presentation of a freight bill if there is a dispute regarding when a freight bill was presented.

The regulation cited by Wise simply states, "*Disputes as to date of mailing. In case of dispute as to the date of mailing, the postmark shall be accepted as such date.*" (Emphasis in original.) This provision in no way makes it incumbent upon Humboldt to present a postmarked envelope to pursue its claims. Such a requirement would make little sense, since only Wise would have access to the postmarked envelopes it received. Here, Wise has submitted no competent evidence raising a dispute regarding when the original bills were mailed. In such instances, the regulations provide that, "the time of mailing shall be deemed to be the time of presentation of the bills." 49 C.F.R. §

1320.4(a). Humboldt has used the date of mailing for each bill as found in Humboldt's business records as the date from which to calculate the authorized credit period of each bill. The court is satisfied that Humboldt's calculations of the expiration of the thirty-day credit period are accurate in each instance.

**3. Humboldt Has Not "Aggregated" Its Late Payment Bills As The Term Is Used In the Credit Regulations.**

The ICC credit regulations allow Humboldt to apply its late payment provisions "only to the nonpayment of original, separate and independent freight bills and shall not apply to aggregate 'balance due' claims sought for collection on past shipments by a bankruptcy trustee, or any other person or agent." See 49 C.F.R. §1320.2(g)(2)(iii). Wise claims Humboldt has violated this provision by bringing this lawsuit because Humboldt seeks to collect late payment charges on various freight bills in a single proceeding, thus, according to Wise, "aggregating" the bills into one complaint.

Wise's interpretation is not supported by the plain language of the regulation. This provision requires that late payment charges be applied separately to each late paid bill and that penalties only be applied to original charges. It prohibits a carrier from assessing late payment charges on a balance due bill, i.e., a non-original bill seeking a higher rate than contained in the original bill. It clearly does not prohibit a

carrier from bringing a lawsuit to collect late payment charges on more than one bill at a time where each charge sought was assessed on a separate, original bill. No purpose would be served by requiring a carrier to file a separate action for each freight bill other than to make judicial enforcement of the carrier's rights preemptively expensive.

Humboldt's evidence establishes its compliance with this requirement. Humboldt sent out individual, non-aggregated, past due bills that were based upon original, properly rated charges. Wise has submitted no evidence controverting Humboldt's evidence on this point. The fact that Humboldt has now combined previously issued, individual late payment bills into one law suit is not prohibited by the regulations. Therefore, Wise's "aggregation" argument is unavailing.

**4. Humboldt's Record Keeping Complied With ICC Regulations, But, Even If It Did Not, Such Does Not Provide A Defense To Wise.**

Wise claims Humboldt failed to comply with ICC regulations regarding record retention. However, the record presents no evidence that Humboldt did not comply with the ICC regulations at 49 C.F.R. §1050 and 1220. Humboldt has submitted evidence establishing the accuracy and veracity of the freight billing information contained in the computer-generated freight bills it sent to Wise. Humboldt has also submitted evidence that it was specifically aware of the ICC's document retention records and

complied with them. Its method of record retention is appropriate under ICC regulations as a "technology that is immune to alteration, modification, or erasure of the underlying data and will enable production of an accurate and unaltered copy." 49 C.F.R. § 1220.3. In contrast, Wise has produced no evidence to the contrary and does not indicate in what way the technology employed by Humboldt fails to meet ICC regulations. Under these circumstances, Humboldt has shown adequate proof of compliance with the ICC's record retention guidelines.

In any event, Wise's claim that Humboldt violated this regulation is irrelevant. Wise has presented no authority establishing that a shipper is entitled to defend a valid claim for freight charges on the ground that the carrier failed to strictly adhere to ICC record retention guidelines. The proper penalty for violation of this regulation is a civil fine payable to the United States. 49 U.S.C. § 14907. It is improbable that a party other than the United States could even bring an action based on this statute. Therefore, Wise cannot rely on this law to provide relief from its contractual duties to Humboldt.

**Wise's Failure To Pay Within The Applicable Time Period Entitles Humboldt To Collect Its Late Payment Charges**

The facts of this case indicate Wise was informed of Humboldt's late payment policy, was aware of the policy, and agreed to the policy. Humboldt's affidavits and the business records of Humboldt prior to its bankruptcy establish that Wise

was timely billed for the shipments at issue and that Wise failed to pay within the applicable credit period. Thus, Humboldt is entitled to the late payment charges set forth in its statement of account pursuant to its filed tariffs and the bill of lading contracts between the parties. Wise admittedly did not pay the late payment charges sought by Humboldt and now is obligated to do so.

### **AFFIRMATIVE DEFENSES**

Wise has raised numerous affirmative defenses to Humboldt's claims in its Memorandum and Motion. The court has concluded that Wise's asserted affirmative defenses fail to relieve it from liability on Humboldt's claims. The claims are not barred by the applicable limitations period. Pre-emption is not applicable. Wise's defenses arising under the Negotiated Rates Act of 1993, Pub. L. 103-180, 107 Stat. 2044, ("NRA") are not cognizable in this case because the NRA is inapplicable to straight accounts receivable cases, as we have here. The common law defenses of rate unreasonableness, waiver, estoppel and laches fail for want of evidentiary proof.

#### **A. Humboldt's Claims Are Timely Under The Applicable Statutes of Limitation**

The NRA established three statutes of limitations periods relating to claims for transportation charges. The NRA explicitly preserved the three year limitations period for transportation services performed prior to its effective date.

NRA § 3(a), codified at former 49 U.S.C. § 11706(a). It changed to two years the statute of limitations relating to transportation services provided between December 3, 1993 through December 2, 1994. NRA § 3(a)(1). It also changed to 18 months the limitations period relating to transportation services provided after December 2, 1994. NRA § 3(a)(2). Wise contends that the passage of the Interstate Commerce Commission Termination Act ("ICCTA"), effective January 1, 1996, altered the statute of limitations on all actions relating to transportation services no matter when provided. However, the court concludes that ICCTA did no more than recodify the eighteen-month limitations period relating to shipments moving after its effective date and did not modify the three tiered limitations scheme of the NRA.

The plain language of ICCTA indicates it has prospective effect only and merely reaffirms the eighteen month statute of limitations period to be applied to transportation services provided after its effective date. The statute of limitations provision appears at 49 U.S.C. § 14705, which states:

**(a) In General.** A carrier providing transportation or service subject to jurisdiction under chapter 135 ... must begin a civil action to recover charges for transportation or service provided by the carrier within 18 months after the claim accrues.

\* \* \*

**(g) Accrual Date.** A claim related to a shipment of property accrues under this section on delivery or tender of delivery by the carrier.

(emphasis in original). This provision indicates no intention to retroactively alter the limitations period of previously accrued claims established by the NRA. The court is aware of the constitutional concerns attenuating retroactively changing a limitations period, especially where Congressional intent of retroactivity is absent, as is the case here. See Chevron Oil Co. v. Huson, 404 U.S. 97 (1971); Saint Francis College v. Al-Khazraji, 481 U.S. 604 (1987); Landgraf v. USI Film Products, 511 U.S. 244, (1994). Therefore, the court concludes the statute of limitations period contained in ICCTA operates only for transportation services provided after its effective date, and the limitations periods of the NRA continue to govern actions based on transportation services provided during the three time periods it explicitly delineates. This conclusion is supported by the legislative history of ICCTA, which indicates the intent of Congress was to preserve the limitations periods set forth in the NRA. H.R. Conf. Rep. No. 422, 104th Cong., 1st Sess. 222 (1995), reprinted in 141 Cong. Rec. H14993-03 at H15050.

Accordingly, all of Humboldt's claims are timely.

**B. Humboldt's Intrastate Claims Are Not Preempted by the FAAAA**

The Supreme Court has conclusively determined that the Federal Aviation Administration Authorization Act of 1994 ("FAAAA") does not preempt claims seeking to enforce the self-imposed undertakings of parties to a contract, rather than claims

for liability arising solely by operation of state law. American Airlines, Inc. v. Wolens, 513 U.S. 219, (1995) ("Wolens"); Accord, West v. Northwest Airlines, Inc., 923 F.2d 657 (9th Cir. 1990); Smith v. America West Airlines, Inc., 44 F.3d 344 (5th Cir. 1995). Here, the late payment provisions of Humboldt's tariffs were specifically incorporated by reference into the bill of lading contract governing each intrastate shipment. Plaintiff has not based its claims upon the filed rate doctrine of any state law, but, rather, seeks to enforce the terms of the agreement between the parties regarding payment of late charges. The sole issue herein is the interpretation and application of that contract as it relates to the shipments at issue. Thus, Plaintiff's action, as a common law breach of contract action, is not preempted by the FAAAA.

C. The NRA Exemptions, Settlement Options, "Unreasonable Practice" Defense, and "Rate Unreasonableness" Defense, now codified at 49 U.S.C. §§ 13709(Humboldt), 13709(b) through (d), 13711 and 13709(f), Respectively, Do Not Apply To These Proceedings To Collect Accounts Receivable

Wise asserts four bases for relief arising under the Negotiated Rates Act, as follows: (1) the "Small Business Exception" appearing at NRA § 2(a), now codified at 49 U.S.C. § 13709(Humboldt); (2) the "Unreasonable Practice Defense" of NRA § 2(e), now codified at 49 U.S.C. § 13711; (3) statutory settlement options of NRA § 2(a), now codified at 49 U.S.C. § 13709(b) through (d); and (4) a claim that Humboldt's rates are

unreasonable, requiring referral of the reasonableness issue to the Surface Transportation Board pursuant to NRA § 2(e)(3), now codified at 49 U.S.C. § 13709(f). All of these provisions, as the title to this law suggests, only apply in the "Negotiated Rate" scenario involving undercharges. Humboldt's claims are fundamentally different from the "undercharge" claims that arose in the trucking industry some years ago. Humboldt's claims are straight forward account receivable claims and do not involve negotiated, off-tariff rates. Therefore, the NRA is not applicable to Humboldt's claims. Accordingly, Wise's requested relief based upon the NRA must be denied.

An undercharge occurs when a carrier charges a shipper a "Negotiated Rate," i.e., a rate other than the legally filed rate in its tariffs, and then later sues to recover the higher rate contained in the tariff. These claims are called negotiated rate cases not simply because the lower tariff rate was agreed to, but because the rates originally charged and collected were negotiated off-tariff discounts. Thus, "Negotiated Rate" is a term of art meaning an unfiled, unlawful rate the parties agreed would replace the lawful, filed rate for a given shipment.

The NRA was enacted as a remedial statute to address the negotiated rate scenario. The statute's language makes it only applicable to "claims involving unfiled, negotiated transportation rates." 49 U.S.C. § 13709 (title). The plain

language of Section 13709 signifies that the NRA is applicable only in cases concerning unfiled negotiated rates. See 49 U.S.C. § 13709(a) (subsection title) (denoting the applicability of the section as "[t]ransportation provided at rates other than legal tariff rates"); 49 U.S.C. § 13709(a)(I) (requiring that "a person was offered a transportation rate . . . other than that legally on file" with the ICC); 49 U.S.C. § 13709(a)(ii) (requiring that "the carrier . . . did not file with the [STB] or the [ICC], as required, a tariff providing for such transportation rate. . ."); 49 U.S.C. § 13709(a)(iii) (requiring that the carrier "did not properly or timely file with the [STB] or the [ICC], as required, a tariff providing for such transportation rate. . .");<sup>3</sup> etc.

Further, the specific subsections of the NRA cited by Wise signify their applicability only in the negotiated rate scenario. For example, Wise's asserted "Small Business Exception," i.e., 49 U.S.C. § 13709(Humboldt), which appears under the headings referring to unfiled rates discussed above, exempts small business concerns from paying "the difference between the carrier's applicable and effective tariff rate and the rate originally billed and paid." The latter must, logically, be

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<sup>3</sup>These requirements also must be met to assert the settlement dispute options of 49 U.S.C. § 13709(b) through (d). 49 U.S.C. § 13709(a) states a defendant "may elect to satisfy the claim under the provisions of subsection (b), (c), or (d) upon showing that --" the elements of (B)(I) through (v), which define the negotiated rate scenario, are evident.

other than an applicable and effective tariff rate or this provision loses all meaning.

Similarly, the "Unreasonable Practices Defense," *i.e.*, 49 U.S.C. § 13711, defines the "unreasonable practice" it applies to as when a carrier attempts "to charge for transportation service the difference between (1) the applicable rate that was lawfully in effect pursuant to a tariff that was filed in accordance with this chapter . . . and (2) the negotiated rate for such transportation service." There has to be a **difference** between the "filed" rate and the "negotiated" rate for this provision to make sense. Thus, it only has meaning in the undercharge scenario, *i.e.*, when the original rate billed and paid was a negotiated, unfiled rate.

Wise erroneously contends that the rate unreasonableness subsection of the NRA does not contain any language limiting its application to 'filed' rates. In addition to the fact that the reasonableness provision Wise relies upon was enacted within the **Negotiated Rates** Act of 1993, the subsection Wise relies upon is specifically limited to cases where "a person proceeds under this section" to challenge a rate's reasonableness. The "section" referred to, Section 13709, provides as its title: "[p]rocedures for resolving claims involving **unfiled, negotiated** transportation rates." The provision Wise relies upon only provides that a defendant to a negotiated rate undercharge action need not pay a

carrier first on its claims prior to proceeding at the STB on its rate reasonableness counterclaim. This provision is completely inapplicable to an accounts receivable claim as is involved here.

These separate provisions, all referring to the negotiated rate scenario, must be viewed as a whole to give meaning to the entire statute. The entirety of the NRA was enacted for a sole purpose -- "[t]o establish procedures to resolve undercharge claims by motor carriers based on negotiated but unfiled or illegal tariff rates. . . ." Preamble, H.R. 2021, 103d Cong., 1st Sess. (1993). The purpose and language of the NRA and, in particular, 49 U.S.C. § 13709 and its subsections, cannot be overlooked to give insular meaning to the subsections asserted by Wise. The court has found in this case that Humboldt's claims for late payment charges are not undercharges involving unfiled rates, but, rather, are accounts receivable. Thus, the provisions of the NRA are inapplicable to this proceeding.

Wise's attempt to apply the NRA's provisions relating to unfiled, negotiated rate cases also fails because there is only one rate at issue here, not two. Humboldt's rate was subject to terms and conditions, such as timely payment. However, terms and conditions of payment, as well as other terms and conditions, are standard in the transportation industry and often appear as components in rules tariffs. Allowing Wise to invoke the NRA when the "original," discounted rate was lawfully filed reads the term "negotiated" right out of the Negotiated Rates Act. What is

left is a statute which exempts all small business from paying any charges that accrue after the original freight bill is presented to them. This, clearly, is not what was intended by passage of a "[p]rocedure for resolving claims involving unfilled, negotiated transportation rates." 49 U.S.C. § 13709.

D. Additionally, The NRA Is Not Applicable To Shipments Moving After August 25, 1994 Because TIRRA Abrogated All Tariff Filing Requirements After Such Date

The Trucking Industry Regulatory Reform Act of 1994 abrogated all tariff filing requirements for all shipments moving after August 25, 1994. See 49 U.S.C. § 13710(a)(4); 49 U.S.C. § 13702. The NRA's Small Business Exemption, Unreasonable Practice Defense, and settlement provisions plainly delineate their scope of applicability to shipments moving prior to TIRRA's effective date. They relate to claims where "the additional legally applicable and effective tariff rate or charges are sought," and exempt small businesses from liability "for the difference between the carrier's applicable and effective tariff rate and the rate originally billed and paid," or allow settlement for certain persons "from whom the additional legally applicable and effective tariff rate" is sought. These provisions, being applicable only in actions involving "legally applicable and effective tariff rates" (i.e., actions based upon the filed rate doctrine), have no bearing on shipments moving after August 25, 1994 because Humboldt had no legally applicable and effective

filed rates after such date. Therefore, for the majority of the shipments at issue in this action, which moved after TIRRA's effective date, the NRA is also inapplicable due to the passage of TIRRA.

E. The NRA's Referral Procedure Is Also Inapplicable Here Because Wise Has No Evidence Supporting its Unreasonable Rate Argument and Is Barred from Asserting its Argument by the 180-Day Rule

The court finds the NRA's rate unreasonableness referral procedure is inapplicable here. However, even if it was applicable, Wise has submitted no evidence on the issue, and, thus, has not presented a triable issue for the court's (or the STB's) consideration. None of Wise's affiants address the issue. On this basis alone, Wise's request for referral must be denied.

Additionally, Wise has waived its right to dispute Humboldt's late payment billing after August 25, 1994 pursuant to the 180-Day Rule. See discussion, *supra*, at page 18. The 180-Day Rule bars all disputes to the billing, no matter what the statutory basis of the dispute. Wise has run afoul of the rule by failing to protest the reasonableness of Humboldt's rates within 180 days of presentation of the billing. Accordingly, Wise has waived its right to challenge the rates now.

F. Wise's Common Law Defense of Rate Unreasonableness Fails

Wise contends Humboldt's loss of discount provision must be stricken as an unreasonable penalty. Again, Defendant has failed to submit any competent evidence that the charges sought by

Humboldt are unreasonable. Thus, lacking a factual predicate, Wise relies instead on a recent district court case in Robbins Motor Transportation, Inc. v. Associated Rigging and Hauling Corporation, 944 F.Supp. 409 (E.D.Pa.) 1996 WL 633803, holding a liquidated damages provision assessing 50% attorneys fees to be an unconscionably high penalty under federal and state common law. The court finds Robbins to be inapposite to the instant case, and therefore inapplicable.

Wise improperly refers to Robbins as involving a loss of discount for late payment. The case involved the application of a 50% attorney's fees provision as liquidated damages for the costs of collection. In so doing, the district court referred to 49 C.F.R. § 1320.2(g)(1)(i) which states that a carrier "may assess reasonable and certain liquidated damages for all costs incurred in the collection of overdue freight charges." The district court found, however, "[d]espite this requirement of reasonableness, there is a surprising dearth of authority specifying what constitutes a reasonable liquidated damage award under 49 C.F.R. § 1320.2(g)(1)(i)." Id. at \*2. The district court noted, "[I]n particular, there is no regulatory authority defining what percentage of the unpaid freight charges may be assessed as liquidated damages." Id. Without such authority, the district court then looked to federal and state common law to determine the appropriate level for a liquidated damage provision for collecting attorneys' fees. Based upon this common law, the

district court found the plaintiff's request for an award of attorneys' fees of more than \$30,000 (50% of the amount of the judgment) "to be unconscionably high." Id. at \*3.

In contrast, Humboldt is enforcing a loss of discount provision that is specifically authorized by regulatory authority in the credit regulations at 49 C.F.R. § 1320.2(g)(1)(ii). It appears from the record here (and in related cases) that discounts -- and discounts of the magnitude of Humboldt's -- were common in the trucking industry; that loss of discount penalties were common in the industry; and that this was accepted practice in the industry. Wise did not present any evidence that at the time the regulations went into effect the level of discounts assessed by other carriers was any different from that assessed by Humboldt in this proceeding. There is no evidence of the credit provisions used by Humboldt's competitors. Thus, the only evidence before the court demonstrates that Humboldt's late payment charges are reasonable.

Wise also failed to offer any evidence that the loss of Humboldt's discounted rates or the charging of a \$25.00 minimum fee or 30% of the originally billed rate is in any way an unreasonable charge for collecting payments on bills that were outstanding for up to a year. Humboldt's late payment provision covers the entire cost of collection (as opposed to just the attorney's fees component referred to by the court in Robbins).

Its penalties are not per se unreasonable. In fact, because the loss of discount provision is an accepted method of assessing collection costs pursuant to ICC regulations, it is per se reasonable. In order to overcome this presumption of reasonableness, Wise had to introduce evidence of unreasonableness, which it has not done.

Also, there is no state or federal common law that would find the loss of a discount on each discreet invoice to be an unreasonable measure of damages for the costs of collecting late payments on each such shipment. Accordingly, Wise's common law unreasonable rate defense must fail.

**G. Wise Has Failed To Establish Its Affirmative Defenses of Waiver, Estoppel And Laches**

Wise bases its defenses of waiver, estoppel, and laches upon a decision of the United States District Court for the District of New Jersey, Moore's Trucking Co., v. National Chemical Starch, 1994 WL 741081 (unpublished opinion D.N.J.) ("Moore's"). However, Moore's is distinguishable from the instant case in several important respects which render it unpersuasive here.

In Moore's, the plaintiff waited between two and four years to assert the late payment charges. "Rather than assert its claim to the full charges at some point reasonably soon after the thirty-day time period for the discount elapsed, or after receiving defendant's remittance based on the discounted rate, plaintiff allowed at least two years to elapse." Id. at 4. The

court noted that the plaintiff did not even make its first demand for payment until one month prior to instituting suit for over \$200,000 worth of bills, many of which were three years old. Here, the undisputed evidence is that Humboldt issued its late payment past due bills to Wise within 38-40 days after the original billing and continued to issue past due billing on all late payment bills at issue in this proceeding. Also, Wise admitted that it was aware at all times of the requirement to pay within 30 days and the consequences of late payment. Thus, Moore's is factually distinct from the instant matter.

Further, Wise faces additional liability of approximately \$6,000.00 on only 15 shipments out of over 700 tendered to Humboldt during the three year period. In Moore's, the defendant found itself facing liability for the first time of over \$216,000 after having tendered 2,025 shipments without any prior notice of asserted liability. The Moore's case is simply inapposite. There is no factual predicate for an estoppel, waiver or laches argument in this case, even if the Court were persuaded to follow the law set forth in Moore's, and it is not. Accordingly, the court finds Wise's affirmative defenses of waiver, estoppel and laches to be unavailing.

**STATEMENT OF PROCEEDINGS AND  
REFERRAL TO THE SURFACE TRANSPORTATION BOARD**

Wise's Memorandum and Motion raise nine issues it contends must be determined by the STB. However, the court has concluded

that there is no requirement that it must stay this proceeding and refer it to the STB; and that it should decline to do so in its discretion. Each issue Wise raises is either inapplicable here as a matter of law, or is not exclusively within the jurisdiction of the STB<sup>4</sup> and is an issue of fact the court is competent to determine. The issues raised by Wise's requests for referral, and the grounds for the court's denial of referral of each, are summarized as follows:

A. **Tariff Applicability:** Wise asserts that Humboldt's late payment provisions, admittedly existing in Humboldt's tariffs during the time relevant to this action, were not part of the contract between the parties because they were not applicable to Wise's traffic. Wise claims that determination of the tariffs' applicability is "technical and complex" and, thus, requires referral to the STB. The court disagrees. Humboldt's tariffs are simple and straight forward contract terms. Whether they are applicable to Wise's traffic requires only evaluation of the evidence of the parties' contracts and a reading of the tariff terms. Wise cites no authority requiring the court to refer tariff applicability issues and the court finds no need for

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<sup>4</sup> There is some question as to whether the STB, rather than the Secretary of the Department of Transportation, has jurisdiction of certain matters raised by Defendant pursuant to the Interstate Commerce Commission Termination Act. See 49 U.S.C. § 13707(b). Since the Court finds referral is not warranted in this case, it does not reach the issue of STB jurisdiction.

referral. Accordingly, the court denies referral of this issue to the STB and has decided the tariff issue raised by Wise.

**B. Applicability of the NRA to Humboldt's Claims:** Wise claims it is entitled to relief from Humboldt's various provisions of the NRA. Wise raises three issues in this regard: (1) applicability of the NRA's Small Business Exemption, codified at 49 U.S.C. § 13709(Humboldt), to Humboldt's claims; (2) applicability of the NRA's Unreasonable Practice Defense, codified at 49 U.S.C. § 13711, to Humboldt's claims; and (3) applicability of the NRA's settlement provisions, codified at 49 U.S.C. § 13709(b) through (d), to Humboldt's claims. Wise claims the issue of the availability of these defenses should be decided by the STB. However, this issue is a simple matter of statutory construction squarely in the court's purview. The court finds it is in the best position to efficiently determine this issue of law, and does not need STB expertise to do so. Therefore, the court denies Wise's request for referral of issues concerning the applicability of the NRA to Humboldt's claims and has decided those issues.

**C. Wise's "Rate Unreasonableness" Defense Under the NRA:** Wise has also requested referral to the STB to obtain a determination regarding the reasonableness of the rates Humboldt seeks to collect. Wise bases its request on the referral mechanism of the NRA codified at 49 U.S.C. § 13709(f). This

provision of the NRA, along with the entirety of the NRA, is inapplicable to Humboldt's claims for accounts receivable because the NRA only applies in the "Negotiated Rates" scenario, i.e., where a carrier has previously charged an unfiled, off-tariff rate and later demands payment of a higher filed rate. This case is fundamentally different from a negotiated rate or undercharge case; and the NRA provisions regarding rate reasonableness are not applicable here. See pages 30-35 supra. This court is capable of making such determinations. Consequently, referral to the STB for a determination of rate reasonableness is not necessary or appropriate.

Further, Wise has failed to provide evidence in support of its rate unreasonableness argument and, for shipments transported after August 25, 1994, has waived its right to challenge the reasonableness of Humboldt's asserted rates under the "180-Day Rule," codified at 49 U.S.C. § 13710(a)(3)(B). Accordingly, the court denies Wise's request for referral to the STB on the issue of rate reasonableness.

D. Humboldt's Compliance With ICC Regulations: Wise asserts that Humboldt's claims are not cognizable because Humboldt allegedly failed to comply with various ICC regulations.

<sup>5</sup> Defendant raises four issues in this regard: (1) whether

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<sup>5</sup>Effective January 1, 1996, with the passage of the ICC Termination Act, these regulations are now administered by the U.S. Department of Transportation. See 49 U.S.C.S. § 13707(b) and reference notes thereto; 49 C.F.R. Part 1322.

Humboldt complied with ICC credit regulations, found at 49 C.F.R. § 1320.2, regarding notification and billing of late payment charges; (2) whether Humboldt is required, pursuant to 49 C.F.R. § 1320.4, to establish the "postmark date" of each mailed bill to assert its claims; (3) whether Humboldt has violated ICC credit regulation 49 C.F.R. § 1320.2(g) prohibiting "aggregated" billing of late payment charges on balance due shipping on past due statements; and (4) whether Humboldt complied with ICC credit regulations, appearing at 49 C.F.R. §§ 1050 and 1220, regarding record retention.

The issues regarding Humboldt's compliance with the credit regulations are matters of fact properly addressed in this court. For example, the billing and notification requirements of 49 C.F.R. § 1320.2 require the court to determine whether Humboldt notified Wise of its late payment provisions, whether Humboldt rebilled Wise assessing late payment penalties within 90 days of the expiration of its credit period, and whether Humboldt issued single past due notices on original bills or aggregated balance due bills for past shipment and then assessed late payment charges. These matters are determinable from the evidence and do not require STB participation. Further, these determinations being within the purview of the court, it would be inefficient to "refer" them to the STB. Wise has not presented any legal basis requiring the court to refer these issues and the court finds no necessity indicating it should choose to refer them.

Two of the regulations issues raised by Wise are of no moment in this action as a matter of law. Wise's contention that Humboldt was required to establish the postmark date of its late payment billing to prevail on its claims is based upon an erroneous conclusion of law. No such requirement exists. The court finds the record retention regulations do not provide a remedy to Wise even if Humboldt did violate them (which the court believes it did not). Therefore, the remaining regulations issues being matters of fact properly before the court, Wise's request to refer is denied.

#### DISCOVERY MOTION

Wise requested a stay of discovery and protective order in its Motion. At the hearing on April 10, 1997, the court rejected this request, ordered discovery and imposed sanctions. That ruling has been memorialized in another Order. In light of the court's determination of this case by entry of summary judgment the issue regarding stay of discovery is moot and the motion should be denied.

#### CONCLUSION

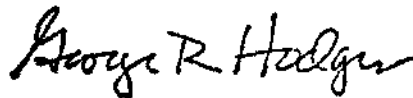
For all of the foregoing reasons, the court finds that Humboldt's Motion for summary Judgment should be, and hereby is granted; and that Defendant's Cross-Motion for Stay of Proceedings and Referral to the Surface Transportation Board on Interstate Claims, Summary Judgment on Intrastate Claims, and

Protective Order Staying Discovery should be, and hereby is, denied in all respects.

It is therefore **ORDERED** that:

1. Plaintiff's Motion for Summary Judgment is **granted**;
2. Defendant's Cross-Motion for Stay of Proceedings and Referral to the Surface Transportation Board on Interstate Claims, Summary Judgment on Intrastate Claims, and Protective Order Staying Discovery is **denied**; and
3. Plaintiff shall have and recover of defendant the sum of \$6,544.52.

Dated: June 10, 1997



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George R. Hodges  
United States Bankruptcy Judge